IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-610

COLUMBUS BOARD OF EDUCATION, et al.,
Petitioners,

vs.

GARY L. PENICK, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

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The undersigned, as counsel for the Neighborhood School Coordinating Committee ("NSCC") and the National Association for Neighborhood Schools ("NANS"), respectfully moves this Court for leave to file the accompanying brief, amici curiae, in support of petitioners, the Columbus Board of Education, et al., claim that, the decision of the lower courts, herein challenged, are in error and should be reversed.

Amici has been denied permission to file the accompanying brief by the respondents Gary L. Penick, et al.

As organizations dedicated to the proposition that critical community and individual interests not be ignored by courts framing equitable desegregation decrees, the

NSCC and NANS represent those innocent parties whose interest is to secure the best possible equal educational opportunity through the re-constitution of a more viable balance among the competing and disparate interests extant in school desegregation cases.

Through the pending class action entitled: *Reeves, et al.* v. *The Penick Class Representatives et al.,* Civil Action No. C-2-78-672 (S.D. Ohio, filed September 22, 1978), members of the NSCC and NANS have collaterally attacked both the liability and remedy orders of the *Penick* court.[1]

Reeves claims that the *Penick* class representatives, its counsel (as designated by the N.A.A.C.P.), and the *Penick* court failed to fairly and adequately represent and protect the interests of the absentee-members of the *Penick* class by ignoring the disparate and antagonistic interests extant among the class, both during the liability and remedy phases of the proceedings. The *Reeves* case highlights the fact that the respondent *Penick* class representatives do not and, indeed, cannot represent before this Court the totality of the interests once purported to be represented by them, *viz.,* all Black and White parents of minor children thereof attending schools in the public school system of the State of Ohio and in the City of Columbus.

[1] In addition to the *Penick* class representatives, the Complaint names the Columbus Board of Education, its individual members and the National Association for the Advancement of Colored People ("The N.A.A.C.P.") as additional defendants. The class consists of all Black and White parents of minor children thereof attending schools in the public school system of Columbus, Ohio, whose interests, being different and antagonistic to those before the *Penick* court, were not fairly or adequately represented by the *Penick* class representatives and their lead counsel, as designated by the N.A.A.C.P., during the liability and remedy phases of the *Penick* proceedings. A motion to dismiss and/or consolidate has been filed by the *Penick* class representatives and the N.A.A.C.P. A Motion to Certify the Class has been filed by the plaintiff class representatives. As of the date of this filing, the motions are pending for decision.

Likewise, neither the interests of the Columbus Board of Education, nor the interests of the Ohio State Board of Education and the Superintendent of Public Instruction (respondents herein) are representative of the interests of the *Reeves* class, the NSCC and NANS. This is so for one immutable reason: no party presently before this Court can aggressively present the highly relevant legitimate and recognizable community and personal interests at stake in the formulation of equitable remedial relief in this school desegregation case. *See Keyes* v. *School District No. 1,* 413 U.S. 189, 240-250 (1973). (Powell, J., concurring in part and dissenting in part).

The NSCC and NANS respectfully request that they be given the opportunity to present the following issues through their amici curiae brief which accompanies this motion:

1. Whether the imposition of a systemwide remedy, requiring the statistical balancing of all schools within a residentially segregated urban school district, exceeds the jurisdiction of a federal court where the court has failed to determine whether such remedy creates a totally reflective and realistic equilibrium between the remedial interests of discriminatees, and the legitimate expectations of parents and students thereof, to be free from the disruption and dislocation of constituent elements of a community, which occurs as a result of, *inter alios,* extensive student transportation decrees which intrude upon fundamental constitutional rights of liberty and privacy.

2. Whether a federal court may presume, on the basis of those considerations set forth in *Brown* v. *Board of Education of Topeka, Kansas,* 347 U.S. 483 (1954), that,

the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution was violated as a result of a finding that local school authorities intentionally maintained and created a racially imbalanced school system, in the absence of any attempt to quantify the harm which may have resulted as a direct result thereof, and, specifically, with respect to whether the quality of the educational opportunity afforded a child assigned to a racially imbalanced school was inferior to that afforded other children in the community, and whether the students who were required to attend the racially imbalanced school were deprived of more important social contacts than the children in other schools.

The NSCC and NANS believe the views they seek to present to this Court will contribute to a proper resolution of the critical issues before this Court, and will be for the benefit of those parties for whom they seek to represent.

WHEREFORE, the NSCC and NANS respectfully request this Court to permit them to file the brief, amici curiae, which is submitted herewith.

Respectfully submitted,

Charles E. Brown

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and

Ira Owen Kane

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2-21, 1979

PROOF OF SERVICE

This is to certify that three copies of this motion for leave to file brief amici curiae have been served upon all counsel of record in this case, pursuant to Rule 33, Rules of the Supreme Court of the United States on this 21 day of February, 1979.

Ira Owen Kane